#### UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BLOOMINGDALE'S, INC.

and

Case 31-CA-071281

FATEMEH JOHNMOHAMMADI, an Individual.

# BLOOMINGDALE'S, INC.'S MOTION TO DISMISS THE COMPLAINT DUE TO THE NATIONAL LABOR RELATIONS BOARD'S LACK OF A PROPER QUORUM

#### I. THE NATIONAL LABOR RELATIONS BOARD LACKS A PROPER QUORUM

On January 25, 2013, the United States District Court for the District of Columbia Circuit issued its landmark decision in *Noel Canning v. NLRB*, No. 12-1115, 2013 U.S.App.LEXIS 1659 (D.C. Cir. Jan. 25, 2013). In this decision, the Court held that three members of the National Labor Relations Board—Sharon Block, Terence F. Flynn, and Richard F. Griffin, Jr.—appointed by the President on January 4, 2012 purportedly pursuant to the Recess Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 3, were not validly appointed. According to the Court, these members were not appointed during an intersession Recess of the Senate, nor were they appointed to fill vacancies that occurred during an intersession Recess of the Senate. Accordingly, they were appointed in violation of the Constitution. As stated by the Court:

<sup>&</sup>lt;sup>1</sup> Art. II, § 2, cl. 3 provides: "The President shall have the Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

"Considering the text, history, and structure of the Constitution, these appointments were invalid from their inception." *Noel Canning*, 2013 U.S.App.LEXIS 1659 at \*45.<sup>2</sup> Moreover, while not addressed directly in the *Noel Canning* decision, the logic of the decision makes clear that Member Craig Becker was also an invalid appointee, since he similarly was not appointed during an intersession recess of the Senate. In this regard, he was appointed *intrasession* by the President on March 27, 2010 (during the second session of the 111th Congress, see *Congressional Directory for the 112th Congress* 536-38 (Dec. 1, 2011).

Because Members Becker, Block, Flynn, and Griffin were not validly appointed pursuant to the Recess Appointments Clause, the Board has not had a valid quorum under the *Noel Canning* requirements since the expiration of Member Wilma B. Liebman's term on August 27, 2011.<sup>3</sup> While Member Brian Hayes was confirmed by the Senate, his term concluded on December 16, 2012. Since that time, the only validly appointed member of the Board has been Chairman Mark Gaston Pearce, who was confirmed by the Senate on June 22, 2010.

Under the United States Supreme Court's decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Board must have a quorum of three validly appointed members in order to lawfully take action, and any orders issued by the Board without a quorum since August 27, 2011 are void *ab initio*. This would appear to include not only Board decisions issued after that date, but also Board appointments of administrative law judges, regional

<sup>&</sup>lt;sup>2</sup> The District of Columbia Circuit refused to follow a conflicting opinion of the Eleventh Circuit in *Evans v. Stephens*, 387 F.3d 1220 (11 Cir. 2004) *cert. denied* 544 U.S. 942 (2005). The Fifth Circuit, which is reviewing the NLRB's decision in *D. R. Horton and Michael Cuda*, 357 NLRB No. 184 (2012), has ordered supplemental briefing in that case on the impact, if any, of the *Noel Canning* decision.

<sup>&</sup>lt;sup>3</sup> Member Flynn resigned from the Board on May 26, 2012. The effective date of his resignation was July 24, 2012.

directors, and perhaps other officials. Similarly, it would seem that all other actions of the Board acting without a valid quorum, as well as its subordinate appointees and officials, would be void.<sup>4</sup>

## II. THE BOARD LACKS JURISDICTION TO PROSECUTE THE PRESENT COMPLAINT AGAINST RESPONDENT IN THE ABSENCE OF A VALID QUORUM OF BOARD MEMBERS

In the present case, the Acting General Counsel is prosecuting unfair labor practice proceedings against Respondent despite the absence of a valid quorum of Board members which meets the requirements of *Noel Canning*. This raises a number of issues, including (a) whether officials appointed by the Board, or delegated authority by the Board, can proceed with the prosecution of an unfair labor practice complaint in the absence of a Board quorum, and (b) whether the prosecution of an unfair labor practice complaint requires a Board quorum so that various actions the Board may be called upon to perform during the course of an unfair labor practice proceeding can be fulfilled.

With respect to the first issue, it appears to be the position of the District of Columbia Circuit, relying upon principles of agency law, that (a) a Board delegation "cannot survive the loss of a quorum on the Board"; (b) "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended"; and (c) "an agent's delegated authority is also deemed to cease upon the resignation or termination of the delegating

<sup>&</sup>lt;sup>4</sup> On February 19, 2013, the District of Columbia Circuit, citing its decision in *Noel Canning*, suspended the Board's appeal of a federal district court ruling invalidating the Board's rule on streamlining representation elections. *Chamber of Commerce of the United States v. NLRB*, No. 12-5250 (D.C. Cir. Feb. 19, 2013).

authority." Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469, 472-73 (D.C. Cir. 2009). Under Section 102.5 of the Board's Rules and Regulations, a regional director is defined to be an "agent" of the Board, and under Section 102.6, an administrative law judge is defined to be an agent of the Board. To the extent Laurel Baye correctly states the law, it would seem that the power of regional directors and administrative law judges to act may cease "when the Board's membership dips below the Board quorum of three members." Id. at 475.

With respect to the second issue, the lack of a valid quorum makes it impossible for Respondent to obtain binding rulings from the Board on motions for summary judgment and motions to dismiss (such as the present motion) because there is not a valid quorum to decide such motions. Nor can Respondent obtain rulings on petitions for review filed with the Board or take other actions that require the intervention of the Board in the absence of a valid quorum. And, once the Administrative Law Judge issues a decision, there will not be a valid quorum of the Board to which this case can be transferred for a decision on any exceptions filed by the parties.

In sum, in the absence of a valid quorum of Board members, it would not appear that the Board has jurisdiction to prosecute its unfair labor practice complaint against Respondent in the present case, and the complaint should be dismissed.

<sup>&</sup>lt;sup>5</sup> Several other Circuits have not adopted the District of Columbia's decision in *Laurel Baye*. See *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal*, L.P., 625 F.3d 844, 853-54 (5th Cir. 2010). In *New Process Steel*, the Supreme Court declined to address the validity of "prior delegations of authority to nongroup members, such as the regional directors or the general counsel." *New Process Steel*, *L.P.*, 130 S.Ct. at 2642, n. 4.

## III. THE BOARD'S LACK OF A QUORUM INVALIDATES THE D.R. HORTON DECISION, WHICH IS THE KEY AUTHORITY ON WHICH THE COMPLAINT AGAISNT RESPONDENT IS BASED.

The Board's decision in *D.R. Horton* was issued on January 3, 2012 by Members Pearce and Becker (Member Hayes was recused and did not participate in the decision). However, as explained above, Member Becker was not validly appointed during an intersession recess of the Senate, and the Board, consequently, did not have a quorum at the time the decision was issued. Therefore, there is no sound legal basis to support the complaint issued against Respondent, and it should be dismissed.

### IV. RESPONDENT'S POSITION REGARDING THE BOARD'S LACK OF A VALID QUORUM

In addition to moving to dismiss the complaint for lack of jurisdiction, Respondent also wishes to reiterate its objection, which it articulated in its position statements submitted to the Regional Office and in its answer to the complaint, that the complaint and the unfair labor practice proceedings being prosecuted against Respondent are barred due to the Board's lack of a valid quorum. Specifically, under the National Labor Relations Act, all authority is vested in the Board, and while others may act on the Board's behalf by statute or delegation, the Board lacks a quorum because the President's *intrasession* appointments are constitutionally invalid. Therefore, the Board's agents and delegates lack authority on behalf of the Board, as a quorum does not exist in fact or in law. Respondent respectfully reserves the right to challenge the

authority of the Board and its agents or delegates at all stages of the proceeding to the extent they continue to act in the absence of a lawfully constituted quorum.

Dated: March 1, 2013

Respectfully submitted,

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Attorneys for Bloomingdale's, Inc.

#### **CERTIFICATE OF SERVICE**

I hereby certify:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action; my business address is Jackson Lewis LLP, 801 K Street, Suite 2300, Sacramento, California 95814.

On March 1, 2013, I served the within:

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on the parties and interested persons in said proceeding:

by forwarding a true and correct copy thereof electronically from e-mail address baumg@jacksonlewis.com between approximately 1:15 p.m. and 1:45 p.m. to the persons at the e-mail addresses set forth below.

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Additionally, on March 1, 2013, I will electronically file the above-mentioned document with the Office of the Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this day of March, 2013 at Sacramento, California.

Gail Kristine Baum